BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK OBERZAN Claimant	)	
VS.	)	
CALIBRATED FORMS CO., INC. Respondent	)	Docket No. 261,781
AND	)	
WESTERN GUARANTY FUND SERVICES Insurance Carrier	)	

ORDER

Claimant requested review of the September 20, 2004, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Appeals Board (Board) heard oral argument on March 8, 2005.

APPEARANCES

David L. McLane of Pittsburg, Kansas, appeared for the claimant. Gary L. Terrill of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations listed in the Award. In addition, respondent and its insurance carrier now stipulate that the claimant sustained a compensable accidental injury on September 23, 2000.[1]

ISSUES

[1]Respondent's Brief at 1 (filed Dec. 10, 2004).

The ALJ found claimant proved he suffered injury arising out of and in the course of his employment with respondent on September 23, 2000. He determined claimant suffered a 5 percent functional impairment over and above a preexisting 15 percent functional impairment and, in addition, had a 38.8 percent work disability based on 18.75 percent task loss and a 59 percent wage loss. For purposes of the wage loss prong of the work disability formula, the ALJ determined that claimant should have a wage imputed to him. Furthermore, the ALJ limited claimant's permanent partial disability award to a 38.8 percent work disability after applying a credit or reduction for a preexisting task loss.

On appeal, claimant argues he is permanently and totally disabled, but that if the Board were to find him capable of performing substantial and gainful employment, then the ALJ erred in finding a preexisting task loss and by reducing the work disability award based upon a preexisting task loss. Claimant also disagrees with the ALJ's findings concerning his percentage of functional impairment, his preexisting functional impairment, his wage and task loss attributable to this work-related injury, past and future medical treatment expenses, and rulings on the admissibility of certain medical records and testimony.

Conversely, respondent contends the ALJ's work disability award should be further reduced to "within the range of 20 percent to 30.5 percent"[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant is a high school graduate with two years of vocational training in school. He has 45 hours of basic college classes at Pittsburg State University. He had a prior non-work-related back injury in 1988 or 89. Dr. Arthur Daus, a neurosurgeon in Joplin, Mo., performed the surgery on claimant's back. Claimant returned to work after surgery. In a 1996 work-related accident, claimant again injured his back when he got stuck in a vessel and twisted his back. As a result, Dr. Daus performed two more surgeries on claimant's back in 1996. Claimant continued to have problems with his back and was sent to another surgeon, Dr. Glenn Amundson, in Kansas City. Dr. Amundson performed surgery on claimant's low back, again in 1996, this time with good results. Claimant was able to return to work a few months after this surgery. Claimant filed a workers compensation claim for the 1996 injury, which he settled on the basis of a 51 percent permanent partial disability. After Dr. Amundson released claimant from treatment, claimant saw Dr. Dennis Estep in Joplin, Missouri, every six months for checkups. Dr. Estep prescribed pain medication for claimant's low back pain. In his July 13, 2000, note, Dr. Estep commented that claimant was taking up to three Lorcet per day. At that time, claimant was working approximately 60 hours per week for respondent, plus an additional three hours per week teaching a post-secondary machine shop class.

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[2] *Id*. at 16.

Claimant began working for respondent in June 1999. His job duties included performing heavy and sometimes even very heavy work. Claimant was injured on September 23, 2000, while working for respondent as a maintenance machinist. As a machinist, he repaired printing machines and made parts for them. He also performed basic facility maintenance. At the time of the injury, he was changing rollers on a printing press. He had rollers on his shoulders and turned and handed the rollers to some shift workers. He immediately felt a sharp pain down the right side of his leg. The rollers were about 2 feet long and weighed around 40 pounds apiece. He continued to work that day, but the pain in his low back and right side consistently became worse day after day. The pain was worse than when he had problems in 1996 and was on the other side. Claimant testified he had never had problems on his right side before.

While working for respondent, claimant testified he worked on approximately 60 pieces of equipment, and the plant covers a block and a half. His duties required him to be on his feet and go to all parts of the plant. Claimant estimated that he walked five to seven miles a day.

Claimant was treated by Dr. Amundson, who ordered an MRI, discogram and tomogram. In July 2001, Dr. Amundson performed surgery on claimant's low back. Before the surgery, claimant was on two doses of OxyContin a day with Hydrocodone medication in between. Dr. Amundson released him from treatment in December 2001. At the time claimant was released by Dr. Amundson, he was still taking OxyContin and Hydrocodone for pain. At some point, claimant became worried that he was becoming addicted to OxyContin, and claimant was then prescribed MS-Contin, which is a morphine sulfate. Claimant took the MS-Contin for awhile and then "weeded it out."[3] When he stopped taking it, he became sick and ended up in the hospital for five days. Claimant currently takes Hydrocodone four times a day.

Claimant testified he last worked for respondent in January 2001 and that he was terminated on January 22, 2002. He has not worked anywhere else since. Respondent sent claimant a letter dated January 29, 2002, stating they could not provide him with accommodated employment.[4] Claimant now receives social security disability benefits.

Claimant was released by Dr. Amundson on December 7, 2001, and has not worked for wages since. He has not contacted any potential employers about gaining employment. He has not prepared or sent out any résumés. He never did an internet search looking for employment. He never talked to respondent about coming back to work.

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[3]R.H. Trans. at 29.

[4]*Id*. at 31, Cl. Ex. 6.

When asked what current problems he had that prevent him from working, claimant testified that he has pain in his low back and his right side and leg all the time. The low back pain is in the area of his belt line. The pain gets worse when he walks. Depending on how much walking he does, he loses feeling in the right leg. When he stands for more than five minutes, the pain worsens. The numbness goes clear down to his foot. Prolonged sitting worsens the low back pain, and his leg goes numb quicker. He cannot lift, as even lifting a bag of groceries causes an increase in his symptoms. He mows his lawn but spreads out the cutting over a two-day period. His doctor recommended that he walk five days a week, but the most he has ever been able is three or four days. He tries to walk 30-40 minutes, but sometimes he stops at neighbors and they take him home. When his medicine wears off, he feels his heart beating "a million miles an hour", he gets diarrhea, and he gets dehydrated easily.[5]

Claimant testified he would not be able to do a sedentary job because he cannot concentrate when he is in pain. He would not be able to do a teaching job because he would have to be on his feet.

Before the accident of September 23, 2000, claimant was taking two to three pain pills a day. He started taking them after surgery number four because of minor joint pain. Claimant took the pain medication almost every day. Claimant currently takes the same pain medication, only a higher dose, and now takes four per day.

Dr. Truett Lee Swaim is a board certified orthopedic surgeon and is certified by the American Board of Independent Medical Examiners. He examined claimant on February 13, 2002, at the request of claimant's attorney. Dr. Swaim testified that the September 23, 2000, injury substantially contributed to claimant's impairment levels but that claimant would have had a preexisting impairment and restrictions because of his prior back condition. Dr. Swaim limited claimant to sedentary work, meaning no lifting or exerting of force over 10 pounds and no prolonged standing or walking. Dr. Swaim testified that claimant does not have the capacity to return to his previous occupation. Dr. Swaim testified that claimant's symptoms of low back and leg pain with standing over five minutes is reasonable in view of his history. Dr. Swaim assessed that claimant had an increase in his impairment level of between 10 and 15 percent of the whole person above any preexisting impairment prior to September 23, 2000. Dr. Swaim's 34 percent rating includes consideration of claimant's preexisting injuries and surgeries. Dr. Swaim opined that claimant had a previous impairment rating between 19 and 24 percent, so his 34 percent rating is somewhere between a 10 and 15 percent increase. Regarding future medical, Dr. Swaim suggested claimant have extension and flexion x-rays to check on stability of the lumbar region. Dr. Swaim testified that claimant will need continuance of pain medication indefinitely.

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[5] *Id*. at 41.

Dr. Swaim testified:

> I state in my report within a reasonable degree of medical certainty that the occupational injury of September 23 of 2000 caused or contributed to cause [claimant] to develop lumbar radicular symptoms and right leg symptoms, and that was due to disk pathology at the L3-4 and L4-5 levels . . . . [I]t increased the abnormalities and contributed enough increase in the lumbara condition that it necessitated the surgical intervention and increased his functional limitations.[6]

Dr. Swaim testified that claimant undoubtedly worked beyond his prior restrictions. There is a difference between what claimant was able to lift before and in how much claimant should lift now. When presented with claimant's task loss list, Dr. Swaim testified that "it appears that he's got 100 percent task loss."[7]

Dr. Jeffrey T. MacMillan is board certified in orthopedics and specializes in spinal work. He saw claimant one time, at the request of respondent, on January 7, 2004. Dr. MacMillan gave claimant a 20 percent functional rating, including any preexisting rating, as of January 7, 2004. He opined that 15 percent of that rating related to claimant's preexisting condition, with only 5 percent relating to his current injury. Dr. MacMillan excluded radiculopathy as a consideration in arriving at claimant's impairment rating because it requires objective identifiable findings and there were no studies to corroborate it. Because claimant lives independently on a small acreage, Dr. MacMillan suggested he lived at a higher than sedentary level and would put claimant in a light physical demand category. Dr. MacMillan testified that claimant's body language was not consistent with someone who was in severe discomfort. Claimant did not move like someone who was in significant pain.

Relative to task loss, Dr. MacMillan testified that under claimant's current sedentary restrictions, claimant was unable to perform 10 of 18 listed tasks prepared by Monty Longacre, a vocational rehabilitation counselor. Dr. MacMillan also opined that prior to September 23, 2000, claimant would not have been able to perform 7 of the 18 tasks. Therefore, since September 23, 2000, claimant has lost the ability to perform three more tasks. Dr. MacMillan testified that claimant is capable of sedentary employment within his functional capacity evaluation and is not completely and totally disabled. Dr. MacMillan testified that claimant should require no future medical treatment concerning his fused back. But he also acknowledged that some studies suggest that adjacent motion segment breakdown of a previous fusion is a natural process of aging, and there is a 15 percent likelihood claimant will need surgery at one of the levels above his fusion. Dr. MacMillan testified it would be appropriate for claimant to have ongoing analgesics for pain. Dr.

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[6]Swaim Depo. at 21-22.

[7]*Id*. at 30.

MacMillan's opinion with respect to work restrictions comes directly out of claimant's FCE. Dr. MacMillan testified that although he believes claimant could probably function in a light physical demand category, he does not have any objective means to demonstrate that. Therefore, despite his own personal feelings, he defaulted to the objective information available in the FCE. Dr. MacMillan also testified that it was possible claimant could have had a 25 percent whole person impairment based upon medical findings in 1996. However, Dr. MacMillan found nothing in claimant's old medical records that he had available to him that would get claimant into that 25 percent criteria. Dr. MacMillan suggested doing an EMG and nerve conduction study on the claimant to determine if there would be objective evidence of his subjective symptoms and thereby meet the AMA criteria for a higher impairment. Dr. MacMillan gives work restrictions to patient's with a fusion based solely on patient comfort rather than fear of what they might do to their non-fused or non-treated motion segment. Dr. MacMillan stated that the only fusions that get into trouble are those that were not fused in the first place.

Dr. MacMillan's report states:

> Although [claimant] reports a variety of lower extremity neurologic symptoms, he does not demonstrate any loss of reflexes, muscle atrophy or nerve root irritation signs on physical examination. Consequently, he does not meet the AMA "Guides" requirements for diagnosis of radiculopathy. . . . In the absence of positive EMG and nerve conduction studies, the application of a rating which includes radiculopathy is not appropriate. . . .
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> . . . It is interesting to note that [claimant] appears to rate the severity of his pain out of proportion to his physical demonstrations of pain. Additionally, by his report, he is quite handicapped even with respect to normal activities of daily living. Yet he lives independently on an acreage. Moreover, he is a very affable individual, to the point of being jovial. Such [an] affect is extraordinarily unusual in an individual who has chronic severe pain.[8]

Monty Longacre testified that since Dr. Swaim, Dr. Amundson and Dr. MacMillan all said claimant could do sedentary work, he felt claimant was able to become employed. During cross-examination and when considering the added restriction of avoiding prolonged sitting, Mr. Longacre testified that if claimant could perform work, he would likely have to begin at an entry level position. Such jobs generally would pay minimum wage or $206 per week based on a 40-hour work week. When compared to his stipulated average weekly wage of $833.85, this results in a 75.3 percent wage loss. Mr. Longacre, after removing duplicative items, came up with a list of 18 job tasks.

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[8]MacMillan Depo., Resp. Ex. B at 3-4.

The ALJ found claimant was not permanently and totally disabled as defined by K.S.A. 44-510c. The Board agrees. Both Dr. Swaim and Dr. MacMillan testified claimant could, at a minimum, perform sedentary full time employment, but with Dr. Swaim adding the requirement of ability to change positions frequently. Mr. Longacre testified that although the number was limited, there were jobs within the restrictions imposed by these physicians.

The ALJ determined claimant was entitled to a work disability. The permanent partial general bodily disability, or what is also known as "work disability," is defined at K.S.A. 44-510e and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment**. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland.*[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland,* the Kansas Court of Appeals held, for

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[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[11]

The Kansas Court of Appeals in *Watson*[12] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[13]

The Board finds claimant has not made a good faith effort to find employment. Accordingly, a post-injury wage will be imputed. Mr. Longacre testified claimant retains the ability to earn minimum wage. The Board agrees that claimant has the capacity to earn $206 per week. Accordingly, his wage loss is 75.3 percent.

As stated in *Hanson*[14]:

> [W]here a work-related injury causes aggravation or acceleration of a preexisting condition, compensation is allowed for the entire disability without apportionment of causation. [Citation omitted.] Hence, the claimant need only show aggravation or acceleration of the condition and a causal relationship between the work-related injury and the disability. Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent.

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[11] *Id.* at 320.

[12] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[13] *Id.* at Syl. ¶ 4.

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 96, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

The Workers Compensation Act provides specific mechanisms to avoid the duplication of benefits. These include K.S.A. 44-501(c) and K.S.A. 44-510a. K.S.A. 44-501(c) provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. That statute reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[15]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides*[16], if the condition is addressed by those *Guides*.[17]

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*[18], the Kansas Court of Appeals stated:

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[15] K.S.A. 44-501(c).

[16] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[17] See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001).

[18] *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

> Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

The Board agrees with the ALJ's finding of a 77.75 percent task loss. When averaged with the 75.3 percent wage loss, the total work disability is 76.5 percent.

The Board also agrees with the ALJ's conclusion that claimant had a 15 percent preexisting impairment of function, and this percentage should be deducted from the total percentage of permanent partial disability. There is no credit or offset for preexisting restrictions or work disability. The statute is clear that all work tasks claimant performed during the 15-year period preceding the accident are to be considered in determining task loss. Respondent may have been eligible for a work disability credit pursuant to K.S.A. 44-510a, but the prior agreed award would have paid out before this accident, and thus there were no overlapping weeks of disability compensation paid or payable.

As claimant is continuing to be treated with prescription pain medications, he has demonstrated a need for ongoing medical care under the supervision of an authorized treating physician. Respondent shall provide claimant with a list of three names, from which claimant shall select one as his authorized physician.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh, dated September 20, 2004, is modified as follows:

The claimant is entitled to 45.29 weeks of temporary total disability compensation at the rate of $401 per week or $18,161.29 followed by permanent partial disability compensation at the rate of $401 per week not to exceed $100,000 for a 61.5% work disability.

As of August 04, 2005 there would be due and owing to the claimant 45.29 weeks of temporary total disability compensation at the rate of $401 per week in the sum of $18,161.29 plus permanent partial disability at the rate of $401 per week for a total due

and owing not to exceed $100,000, which is ordered paid in one lump sum less amounts previously paid.

All other findings, conclusions and orders contained within the ALJ's Award are hereby affirmed to the extent they are not inconsistent with the above findings, conclusions and orders of the Board.

IT IS SO ORDERED.

Dated this _____ day of August, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: David L. McLane, Attorney for Claimant
Gary L. Terrill, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director